

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of NorthStar Alarm Services, LLC's)	
Petition for Expedited Declaratory Ruling)	
)	CG Docket No. 02-278
In the Matter of Rules and Regulations)	DA 19-74
Implementing the)	
Telephone Consumer Protection Act)	
)	

Reply Comments of

National Consumer Law Center
on behalf of its low-income clients

In Opposition to the Petition for Declaratory Ruling
Filed by NorthStar Alarm Services, LLC

March 26, 2019

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Reply Comments

These comments are respectfully submitted to the Federal Communications Commission (FCC or Commission) by the National Consumer Law Center (NCLC), in furtherance of the comments we filed on behalf of our low-income clients and several other national public interest groups on March 15, 2019, in opposition to a petition filed by NorthStar Alarm Services, LLC.¹ Our primary comments² already set forth the reasons in some detail why the Commission should not grant NorthStar's petition, which seeks a ruling that an unwanted telemarketing call in which the caller plays prerecorded snippets—known as a robot call—is not one made “using ... an artificial or prerecorded voice.”³

We ask that these reply comments be considered as an addendum to our primary comments. They respond to issues raised by industry comments and they address issues that we did not cover in our primary comments.

I. Congress Has Already Indicated that a Call in Which a Human Plays a Prerecorded Audio Clip Requires the Called Party's Prior Express Consent.

The comments filed by the Soundboard Association wrongly assert that Congress has not considered whether the TCPA should be “expanded” to reach the technology in which a human being plays prerecorded messages to the called party:

Further, the FCC should take this opportunity to explain on the record that when *Congress has not considered* whether the TCPA should be expanded to reach a new

¹ The organizations on whose behalf we filed our March 15 comments are Consumer Reports, Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, and Public Knowledge.

² Our primary comments may be found at <https://ecfsapi.fcc.gov/file/10316106937526/4%20Comments%20on%20NorthStar%20Alarm%20Services%20.pdf>.

³ 47 U.S.C. § 227(b)(1)(A).

technology, such as soundboard, the FCC will not administratively expand the Act to ban that technology.⁴

But the legislative history of the TCPA shows that Congress *did* consider this question, and specifically intended that the called party's prior express consent be required even when a human being is playing a prerecorded audio clip. The Senate Committee report that was issued at the time of the TCPA's enactment states:

[W]hen a consumer answers the phone, a "live" person can ask the consumer if he or she consents to listening to a recorded or computerized message. If the consumer indicates express consent, the "live" caller may switch to a recorded or computerized message. The Committee does not believe that this consent requirement will be an inordinate regulatory burden on the telemarketer.⁵

In this passage, the Senate directs that the playing of an audio clip does not violate the TCPA *if a live caller obtains express consent before playing the clip*. Thus, the Senate treated the playing of an audio clip by a live caller in a telephone call as an act that requires prior express consent. The petitioner wants to play audio clips *without* prior express consent. To grant the petition would fly in the face of the clear intention of Congress.

II. The FCC Lacks Authority to Exempt the Petitioner's Prerecorded Telemarketing Calls from the TCPA.

As noted in the preceding section, Congress made clear when it enacted the TCPA that a call in which a human plays an audio clip is prohibited unless the called party gives express consent before the audio clip is played. The petition here amounts to a request that the FCC create an exemption for the prerecorded calls in question.

⁴ Comments of the Soundboard Association in Support of NorthStar Alarm System, LLC's Petition For Expedited Declaratory Ruling, at 5, CG Docket No. 02-278 (Mar. 15, 2019) (emphasis added), *available at* <https://ecfsapi.fcc.gov/file/10315019589762/SBA%20Comments%20to%20NorthStar's%20Petition%20for%20Expedited%20Declaratory%20Ruling%20031519%20-%20CG%20Docket%20No.%2002-278.pdf>

⁵ S. Rep. 178, 102d Cong., 1st Sess., at 8 (1991). *See also* comments of Senator Hollings upon introduction and passage of the Telephone Consumer Protection Act, 137, Cong. Rec. 16204 (Nov. 7, 1991) ("Such consent also could be obtained by a live person who simply asks the called party whether he or she agrees to listen to a recorded message.").

The Commission lacks authority to grant such an exemption. Under the TCPA, the FCC has the authority to allow prerecorded calls to cell phones without the called party's consent only if the call is free to the end user and if the FCC imposes conditions to protect the privacy of the called party.⁶ The petitioner has not even proposed to limit its robot calls to those that would be free to the end user, or to abide by any conditions that might avoid the invasion of privacy caused by these calls.

As for prerecorded calls to residential lines, if the call is for commercial purposes the FCC has the authority to dispense with the called party's prior express consent only if the calls will not adversely affect the privacy rights that the TCPA is intended to protect *and* the calls do not introduce any advertisements.⁷ NorthStar, which used soundboard technology to deluge millions of consumers with unwanted robot calls to sell home security systems, cannot possibly qualify for an exemption under this provision.

III. The Industry Comments Do Not Even Attempt to Rebut the FTC's Conclusion that Calls Made with the Soundboard Technology Deliver "Prerecorded" Messages.

As noted in our primary comments, the Federal Trade Commission (FTC) has considered the exact issue that NorthStar presents, and has rejected it.⁸ The FTC analyzed its extensive record of consumer complaints regarding robot calls and the manner in which these calls are made, and concluded that they "deliver a prerecorded message" within the meaning of the Telemarketing Sales Rule.⁹

⁶ 47 U.S.C. § 227(b)(2)(C).

⁷ 47 U.S.C. § 227(b)(2)(B).

⁸ Letter from Lois C. Greiman, Associate Director, Div. of Marketing Practices, Fed. Trade Comm'n, to Michael Bills (Nov. 10, 2016) (Re: September 11, 2009 Staff Opinion Letter on Soundboard Technology), available at <https://www.ftc.gov/policy/advisory-opinions/letter-lois-greiman-associate-director-divisionmarketing-practices>.

⁹ *Id.* at 3.

The industry comments—those filed by NorthStar and the Soundboard Association¹⁰—do not even attempt to distinguish or rebut the FTC’s findings. Other than mentioning the history of the FTC’s determinations on this question, and attaching a transcript of a hearing in a case between private parties in which the FTC’s ruling is mentioned, NorthStar and Soundboard simply ignore the FTC’s ruling.¹¹

NorthStar’s and Soundboard’s silence is telling. There simply is no sound basis for distinguishing or rebutting the FTC’s ruling.

Nor does either NorthStar or Soundboard offer any justification for the FCC to adopt a ruling on this question that would conflict with the ruling of its sister agency. Indeed, Congress has looked unfavorably on conflicts between the FTC’s telemarketing rules and the FCC’s TCPA rules, going so far as to order the FCC, when promulgating its do-not-call rule, to “consult and coordinate with the Federal Trade Commission to maximize consistency with” the FTC’s rule.¹² It also ordered the two agencies to make a special report to Congress on “any inconsistencies between the rules promulgated by each such Commission and the effect of any such inconsistencies on consumers, and persons paying for access to the registry.”¹³ Even if there were some justification for treating robot calls as

¹⁰ Soundboard’s comments are available at <https://ecfsapi.fcc.gov/file/10315019589762/SBA%20Comments%20to%20NorthStar's%20Petition%20for%20Expedited%20Declaratory%20Ruling%20031519%20-%20CG%20Docket%20No.%2002-278.pdf>, and NorthStar’s are available at <https://ecfsapi.fcc.gov/file/1031590926415/Comments%20of%20NorthStar%20Alarm%20Services%20LLC%20CG%2002-278%2003.15.19.pdf>.

¹¹ Northstar’s statement in its comments regarding the number of consumers who were on the line during its contractor’s telemarketing calls on its behalf is not germane to the issue before the FCC, which is solely whether these calls use a prerecorded voice such that they are covered by the TCPA. Moreover, even if these assertions regarding the one-on-one nature of these calls are true (and there is no sworn testimony on this point), they don’t change the nature of the calls themselves, which petitioner admits were using pre-recorded snippets of voices.

¹² “Do-Not-Call” Implementation Act, Pub. Law No. 108-10, § 3, 117 Stat. 557 (2003).

¹³ *Id.* at § 4(a)(2).

if they did not use a prerecorded voice, the FCC should not strike a different path from the FTC without a compelling justification.

Moreover, the TCPA's restrictions on calls that use a prerecorded voice are statutory,¹⁴ and the FCC has only limited authority to grant exemptions.¹⁵ As a result, the FCC has far less authority to consider granting an exemption for robot calls than does the FTC, which adopted the Telemarketing Sales Rule under an authorizing statute granting it broad discretion to shape a rule. The FTC's determination that soundboard technology is and should be subject to the restrictions applicable to prerecorded calls is even more persuasive since the FTC had such broad discretion and was under no constraints if it concluded that the opposite conclusion would be better.

IV. Conclusion

For all of these reasons, the Commission should deny NorthStar's petition.

Respectfully submitted, this the 26th day of March, 2019, by:

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¹⁴ 47 U.S.C. § 227(b)(1)(A), (B).

¹⁵ See section II of these comments, *supra*.